21804

Has the Congress of the United States the Constitutional Power to Lay and Collect Export or Import Duties on Commerce Passing Between the States and the Territories Recently Acquired Under the Spanish Treaty?

The federal Constitution authorizes Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." You will observe that, in the modifying clause requiring uniformity, the word "taxes" is omitted. The reason for the omission is that uniformity in respect of "taxes," as thus used in the Constitution, is provided for and enjoined in other provisions of the instrument. For instance: "Representatives and direct taxes shall be apportioned among the several States * * according to their respective numbers." And again, "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein directed to be taken." The first census was ordered at the beginning of the Government, and subsequent enumerations are to follow every ten years thereafter.

It will be seen, therefore, that taxation by Congress, in all its forms, must be uniform in its operation "throughout the United States."

The first question in order, therefore, is this. Are the

territories a part of the United States? If so, it must be admitted that the injunction of uniformity extends to them equally as to the States themselves. These clauses of the Constitution received clear and explicit interpretation by the Supreme Court of the United States eighty years ago, in the case of Loughborough *v.* Blake, 5 Wheaton.

Congress had levied a direct tax, and in its apportionment the Territories and District of Columbia were included. This was met with the contention that the apportionment could only be made "among the *States* which may be included within the Union;" and that the District of Columbia and the Territories, not being States, were not subject to the tax. The issue thus presented necessarily involved a full definition of this power of taxation, as well as the territorial limits within which the power could be exercised.

The following is an extract from the unanimous opinion of the Court, delivered by Chief Justice Marshall:

> "The 8th section of the first article gives to Congress the power to 'lay and collect taxes, duties, imposts, and excises,' for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, 'but all duties, imposts, and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, 'to lay and collect duties, imposts, and excises' may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion, of the American empire? Certainly this question can admit of but one answer. It is the name given to

> our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

Near the close of the opinion in this case, the Court indulges in the pleasant reflection that, while the District of Columbia and the Territories were subject to the laws of taxation, they were nevertheless protected from oppression by the constitutional guaranties of uniformity and equality of apportionment in the exercise of the power.

In the face of this construction of the Constitution, recognized and acted upon by all the departments of our Government from its origin down to the present time, it is now deliberately proposed in the Congress of the United States to place our new Territories wholly outside of the Constitution, to govern them with powers of absolute dominion, to hold and treat them as alien provinces, and to subordinate their interests to the unlimited control of a government in which they are not to be represented.

The claims for this new and extraordinary doctrine are attributed to various sources of power. First, it is insisted that the United States is a sovereign nation, and as such it must necessarily possess all the attributes and powers of sovereignty as known and exercised in other nations.

It may be admitted that absolute sovereignty rests with

the *people* of the United States, but, as an American, I am proud to know that the Government of the United States is *not* unlimited in its sovereignty. The people in their aggregate capacity do not make treaties or laws. The people, it is true, act through representatives, but no act of those representatives can be performed outside of the Constitution. The Constitution was made by the people as a check upon their representatives. The people may amend the instrument, but, until changed by them, in the mode provided therein, that Constitution, with all its limitations, operates upon and restrains every act of every department of the Government.

A nation which possesses the power to govern itself, without dependence upon any foreign power or state, is properly denominated a sovereign state. The form of its government is wholly immaterial. It may be a pure democracy, a monarchy, or a republic with limited and defined powers such as our own. In the United States there is no unlimited sovereignty except that which resides in the people themselves. The government which they framed and put into operation possesses sovereignty, but only a limited sovereignty. The sovereignty may be absolute as against other nations. It is limited as to its own citizens. Within the territory belonging to the United States the power of the federal Government is limited and controlled by the Constitution. The Government of the United States is the creature of the Constitution, and therefore, it can exercise no powers except those specially enumerated and granted, and such as may be absolutely necessary to carry out the powers specifically conferred. Hence, when we speak of the sovereignty of the United States, we mean a constitutional sovereignty, a sovereignty limited by the specific grants of power enumerated in the Constitution.

In speaking of any one of the States in the Union, we

generally refer to it as a sovereign State. The State does not possess a complete and perfect sovereignty, of course; but, as to all matters within the scope of its authority, its sovereignty is as clear and unchallenged as that of the federal Government itself. The federal and State governments, though exercised within the same territorial limits, are separate and distinct sovereignties. Both are limited. Neither is absolute.

In this connection I quote from Judge Story's work on the Constitution, as follows:

> "The sovereignty of a nation or state, considered with reference to its association, as a body politic, may be absolute and uncontrollable in all respects, except the limitations, which it chooses to impose upon itself. But the sovereignty of the government, organized within the state, may be of a very limited nature. It may extend to few, or to many objects. It may be unlimited as to some; it may be restrained as to others. To the extent of the power given, the government may be sovereign, and its acts be deemed the sovereign acts of the state."

I come now to a second source of claim for this new power. This claim admits the limited sovereignty of the federal Government, but insists that the treaty-making power being without limitation, when it comes to be exercised, suddenly expands and enlarges itself beyond the usual restraints of the Constitution. In other words, it is urged that, although the Constitution is the admitted source of the treaty-making power, yet in the exercise of the power the Constitution itself may be subverted. This strange power is therefore greater than its creator. It is an Aaron's rod which swallows up all other powers and overrides all the guaranties for civil liberty contained in the Constitution. A treaty, therefore, with an Indian

chief may overturn the principles of constitutional liberty in the forty-five great States composing the American Union.

It is admitted that the President and both branches of Congress have no such power. But the President with two-thirds of the Senators, not all the Senators elected, but two-thirds of those Senators who may happen to be present at the time, may leap all bounds of constitutional restraint and impose upon the people a government alien in principle from that under which we have lived in happiness for over a century, and entirely foreign to the intentions of its framers. In other words, it is insisted that the President and the Senate, in the exercise of the treaty-making power, are not restrained by those constitutional limitations which operate upon Congress in the passage of laws.

Let us examine this contention for a moment. Justice Story, in his Commentaries on the Constitution, says:

> "But though the power to make treaties is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the States. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people."

Mr. Tucker, in his late work on the same subject, uses the following language:

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. A treaty cannot compel any Department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction is, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditional authority vested in the judiciary. Therefore, neither must be construed as absolute and unconditioned, but each must be construed and conditioned upon the equally clear power vested in the others. For example, Congress has power to lay and collect duties; the President and Senate have power to make and contract with a foreign nation in respect to such duties. Can any other construction be given to these two apparently contradictory powers than that the general power to make treaties must yield to the specific power of Congress to lay and collect all duties?"

Judge Cooley, in his "Principles of Constitutional Law," says:

"The President has power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senate concur. The Constitution imposes no restriction upon this power, but it is subjected to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the Government or any of the States of its constitutional authority."

Again he says:

"The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. It may

> be amended according to its own permission; but while it stands, it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. 'No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government.'"

I might add quotations on this subject from Sargeant, Kent, Pomeroy, and others. Such quotations would but reassert in different phraseology this long-established doctrine of constitutional interpretation.

"A treaty," says the Supreme Court of the United States, "is a law of the land as is an act of Congress." Again, that court has said: "there is nothing in this law [a treaty] which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress." Hence it has always been held that treaties, like laws of Congress, may be attacked in the courts for unconstitutionality, and may be repealed or modified by act of Congress.

The same provision of the Constitution which declares a treaty to be the supreme law of the land, gives equal authority to acts of Congress. If either treaty or law be repugnant to the Constitution, it is void and must be so declared by the courts. These have long since become settled interpretations of the organic law of the Government. They are the outgrowth of that provision of the Constitution which extends the judicial power equally to cases arising under treaties as to cases arising under the laws of Congress.

If a treaty possesses absolute and unlimited authority, above the Constitution and all legislative acts, what is left for judicial inquiry? The truth is that in the government of the United States the Constitution is the full limit of power, and all laws and all treaties must conform to its provisions.

It is frequently asked with an air of triumph, "Are not the powers of Congress over the Territories co-extensive with those of both the federal and State governments?" Inasmuch as the Territories are a part of the United States and have no other law-making body than the Congress, the question may be readily answered in the affirmative. It is the answer given by the Supreme Court in repeated decisions, and the decisions are sustained by the Constitution and by common sense. But when it is admitted that the authority of Congress in the organization and government of the Territories combines the powers of both the federal and State legislatures, the admission must be coupled with the condition already stated, that neither State nor federal authority is unlimited. The Government of the United States is created by the Constitution. The powers of that Government are exerted through the three departments established and clearly defined in that instrument. Neither one department, nor all three departments combined, can legally perform any act outside of the authority therein granted. In other words, the powers not delegated to the United States by the Constitution cannot be exercised by Congress when legislating for the nation at large; and the powers denied to the States by the Constitution cannot be exercised by Congress when legislating for the Territories.

The limitations of the Constitution are designed to operate upon the governments of both State and nation, as an ever present barrier against oppression, injustice and

wrong. As a federal legislature, Congress can pass no "bill of attainder or *ex post facto* law." Acting for a Territory Congress is equally restrained because the States are expressly forbidden to pass such laws.

Congress in its national character cannot establish slavery; and when acting for the Territories it is equally retrained by the XIII amendment, declaring that "slavery shall not exist in the United States or any place subject to their jurisdiction."

The 2d section of the 4th article of the Constitution provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This stands as a guaranty against inequality in both State and federal legislation, while the XIV amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." All these restraints upon State legislation necessarily operate as limitations upon Congressional legislation in the Territories.

Congress has the power to lay and collect duties on imports brought into the United States, but the power does not exist apart from the condition that such duties "shall be uniform throughout the United States." The condition is coupled with the power; and uniformity is the *sine qua non* of its exercise.

The Constitution explicitly forbids the imposition of taxes upon exports. "No tax or duty shall be laid on articles exported from any State," and this language embraces Territories as well as States. The restriction upon State authority is equally explicit. "No State shall, without the consent of the Congress, lay any imposts or duties

on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

Congress is forbidden to "give preference, by any regulation or commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to, or from one State to another, be obliged to enter, clear, or pay duties in another."

It would seem that under any reasonable construction of these provisions of the organic law of the Government, the proposed enactments of Congress, levying import and export taxes on home products mutually exchanged between the Territories and the States, must be held nugatory and void.

But we are answered by the imperialistic contention that the Supreme Court of the United States has already settled the question involved. A sentence is extracted from the case of Murphy *v.* Ramsey, 114 U. S., declaring that "the people of the United States, as sovereign owners of the Territories, have supreme power over them and their inhabitants."

"Supreme power," in the vocabulary of this great court, is not despotism, but only the full limit of legislative authority under the restrictions of the federal Constitution. The words must not be dissociated from the subject-matter under consideration, nor isolated and torn from their context. They need no definition beyond a statement of the single question reviewed in the opinion itself. The sole question involved was the power of Congress, in legislating for the Territory of Utah, to limit the right of suffrage to those qualified to vote under what is

known as the Edmunds Act against polgamy. The question brought in issue referred to political, not to civil or personal rights of the inhabitants of Utah. The power claimed and exercised, in this case, has not been seriously disputed since the passage of the ordinance of 1787 for the government of the Northwest Territory under the Articles of Confederation down to the present time.

Supreme power in Russia means one thing, in Germany another thing. In the United States its definition has heretofore been modified and tempered by the environments of constitutional law. But the Supreme Court, in this identical case, gives us its own definition of the language used, as follows:

> "In the exercise of this sovereign dominion, they [the people] are represented by the Government of the United States, to which all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms, or in the powers and objects of the power itself; for it may well be admitted, in respect to this as to every power of sovereignty over its members, that it is not absolute or unlimited."

In this case the court draws the distinction between civil and political rights, and proceeds as follows:

> "The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of Congress."

The opinion then quotes approvingly those numerous decisions of the court in which the true principles of the

American Constitution have been so ably vindicated and upheld.

The same broad language is used by the court, in the case of the Bank *v.* Yankton County, 101 U. S. But when the case itself is examined, it involves only the authority of a county in Dakota to issue bonds to a railroad company—the issue and sale of the bonds having been authorized by an act of the Territorial legislature of Dakota, amended and modified by an act of Congress. The Supreme Court here upholds the act of Congress on the familiar ground that "Congress may do for the Territories what the people under the Constitution may do for the States." The court again uses the word "supreme;" but again limits the extent of its meaning by the following language: "except such (powers) as have been expressly or by implication reserved in the prohibitions of the Constitution."

The case of Cross *v.* Harrison, 16 Howard, is often cited, as one directly in point, to refute the position assumed in this brief. It is urged that the military authorities in California, under orders of the President of the United States, levied and collected impost duties without regard to the rates fixed by the tariff laws then in force. Let this be admitted; but on examination of the case the power is expressly limited by the court to the period of military occupation and to be determined in time by the ratification and exchange of the treaty of peace. On page 190 of the report the court said:

> "No one can doubt that these orders of the President, and the action of our army and navy commanders in California in conformity with them, were according to the law of arms and the right of conquest, and that they were operative until the ratification and exchange of a treaty of peace."

These orders of the President, thus given to the military authorities, are fully set forth in the instructions of Mr. Buchanan, who was then Secretary of State under President Polk. After directing the collection of taxes under the *de facto* government as a military necessity, the Secretary proceeds:

> "This *de facto* government will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles, the growth, produce or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States."

Under these instructions the war tariff was immediately, on receiving news of the ratification of the treaty, made to conform to the laws of the United States (the tariff act of 1846), and this change received the approval of the court in these words, to wit:

> "That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the Executive of the United States, or without any interference to prevent it. Indeed, from the letter of the then Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the action of

> the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recognition under all the circumstances; and when we say rightful, we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California."

It was not my purpose to allude to the phraseology of the late Spanish treaty. That treaty, like all other treaties and enactments of Congress, is subject to the limitations of the Constitution. When territory is acquired, it must be governed by American law and not by that of the former owner. The flag and the Constitution must go together. The moment when sovereignty attaches, that moment the Constitution spreads over all the land its guaranty of republican government. If there be a slave he instantly breathes the breath of freedom. If there be a bondman, his shackles fall. If there be despotism it suddenly retires in shame as rational liberty asserts its sway.

If the framers of this late treaty intended to invest Congress with unlimited control over the territories acquired, it is enough to say that the Constitution of this Republic cannot be amended by the Spanish monarchy even with the aid of the five worthy Commissioners who assisted in the work. If they mean that the "civil rights" of the people in this territory "shall be determined by the Congress" regardless of those constitutional restraints which operate upon it as upon all Departments of our Government, their intentions will be disappointed by the wisdom of the Supreme Court and the patriotism of the people.

This paper has perhaps already reached unnecessary length. If more be needed to convince even skepticism itself, it may be found in the debates of that memorable

convention of 1787 which framed the Constitution in this city. It may be found in the proceedings of the thirteen State conventions immediately thereafter assembled to determine the ratification or rejectment of the instrument thus framed; and it may be equally found in those celebrated papers of Madison, Jay, and Hamilton, explaining to the American people the origin, history, and meaning of each of its provisions. These will furnish that contemporary interpretation which the courts have adopted as the best expounders of laws and constitutions. If still more be needed for safe construction, it may be found in the undoubting acquiescence and the unbroken practice of the Government, in all its departments, for one hundred and twelve years. These are the faithful prophets of interpretation, and if men refuse to hear them, "neither will they be persuaded though one rose from the dead" and proclaimed the truth.

If the legislation now proposed for Puerto Rico should be applied for twenty-five years to the richest State in the American Union, its wealth will have departed and its inhabitants will have become paupers.

It has been said that the trusts and protected interests of the country have demanded this sacrifice of republican justice to the now dominant spirit of avarice and greed. If such be the case, no accusation of the anti-imperialist is without its vindication. If this legislation is to be enforced, the Territories of the United States will hereafter be known as colonies. They will be governed not by those familiar and sympathetic with their interests, but by aliens, greedy of their earnings and heedless of their sufferings. As the feast grows small the vultures will fight over the prey. Rome did no more than this. And if we follow her example, we must expect to follow her fate.

JOHN B. HENDERSON.

WASHINGTON, D. C.